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No. 102 MISC.

IN THE

Supreme Court of the United States

October Term, 1949.

COMMONWEALTH Ex Rel. DAVID DARCY,

v.

EARL D. HANDY, Warden, Bucks County Prison.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully presents:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner was convicted of first degree murder and the death penalty was fixed by a jury in the Court of Oyer and Terminer of Bucks County, Pennsylvania, on June 14, 1948. The judgment was affirmed by the Supreme Court of Pennsylvania (362 Pa. 259) and a petition for reargument was refused. A petition for certiorari to review the order of the Supreme Court of Pennsylvania, affirming the judgment and sentence has been filed in this Court. The instant petition, however, rests on different grounds and asks for review of an order of the Supreme Court of Pennsylvania denying petitioner a writ of habeas corpus.

The record discloses the following salient facts.

Petitioner, aged 22, was indicted together with three other youths, Harold Foster, aged 23, Harry Zietz, aged 18, and Felix Capone, aged 16, for the murder of one William Kelly.

The theory of the Commonwealth was that Kelly was killed while Zietz, Foster, Capone and petitioner were de-

parting in a moving automobile from the Feasterville Tavern on the Bustleton Pike, Doylestown, Pennsylvania (288) on the night of December 22, 1947, after having robbed several persons in the Tavern.

Kelly had not been connected with the robbery in any way.

When the automobile pulled away from the Feasterville Tavern, Kelly was standing across the road talking to two friends (581-584). The automobile passed the spot where Kelly was standing. When the auto was 10 to 20 feet away from Kelly (591, 611) two shots were fired by Zietz from the front window on the driver's side. These shots had been fired by Zietz with his left hand while he was steering the automobile and shifting gears with his right hand (591, 608, 820-821). He fired because the others said "someone was coming out the door" (821). Kelly was nowhere near the door. There is no evidence that Zietz aimed his shots at any person or at any particular thing. One bullet struck Kelly in the head, killing him; the other bullet came to rest in a house at the corner of Bustleton Pike and Churchville Road directly across the street from the Tavern. The defendants escaped but were later apprehended in Philadelphia.

As stated above, petitioner's conviction and the affirmance thereof by the Supreme Court of Pennsylvania have been made the subject of a petition for a writ of certiorari in this Court. However, the questions raised by *this* petition for certiorari and by the petition to the Supreme Court of Pennsylvania for a writ of habeas corpus have not been made the subject of the other proceeding.

At the trial of petitioner's case the Commonwealth, over objections, exceptions, motions for mistrial, etc. (R. 677, 678, 690, 691, 698-700, 709, 716-17, 729, 734, 811-13, 830-31, 839-41, 857, 901-902) was permitted to show the facts and circumstances of other offenses alleged to have been committed by appellant as follows:

First: Commonwealth's witnesses Joseph Gersch, Louis Checchia, Angelo Spadaccino, Gerhart Keller, Frederick W. Lachenman and Valeria Lachenman testified in great detail as to a hold-up committed about half an hour after the Feasterville Tavern hold-up on December 22, 1947 (683) by Foster, Zietz, Capone and petitioner at the Deacon Inn on the Lincoln Highway about two miles southeast of Langhorne and about eight or thirteen miles from the Feasterville Tavern, depending upon the route traveled (679, 859, 860).

Second: The Commonwealth put in evidence Exhibit CX-69 (814) being a written statement obtained by the police from Foster, Zietz, Capone and petitioner. The statement related both to the hold-up at the Feasterville Tavern and to the hold-up at the Deacon Inn.

Third: The Commonwealth put in evidence Exhibits CX-71 and CX-73, being written statements obtained by the police from Foster, Zietz, Capone and petitioner. The statements purported to be admissions of hold-ups at the following times and places:

(1) Waterford, New Jersey, on November 30, 1947;

(2) Maple Shade, New Jersey, on December 3, 1947;

(3) Elkins Park, Pennsylvania, on December 13, 1947.

Since the crime for which petitioner was being tried had occurred on December 22, 1947, these three separate and disassociated offenses had occurred respectively twenty-two days before the crime for which petitioner was being tried, nineteen days before the crime for which petitioner was being tried, and nine days before the crime for which petitioner was being tried.

This evidence was elicited through the medium of officers who took the statements (R. 827-829). With respect to this evidence petitioner objected, was overruled and the evidence was admitted. He also moved for a mistrial which was denied and an exception was granted (830, 839, 840, 857).

The trial court charged the jury as follows (See Paragraph 4 of Petition for Writ of Habeas Corpus):

> "Now, you will find included in these confessions or admissions by these defendants, including Darcy, reference to a number of other robberies having been committed or attempted to having been committed by them. I believe Darcy was not in one of them, perhaps there were others that you will remember. These confessions with respect to these prior crimes or their prior records were admitted only for one purpose, as was the testimony of what occurred at the Deacon Inn, namely, to provide you with information which may throw light upon the character of the defendants so that you may know, in the event of a conviction of murder in the first degree, what manner of man the defendant David Darcy was, and to better enable you to fix the punishment for the offense. These references to these other independent crimes must not be considered by you as proof of the commission of the offense alleged to have occurred at the Feasterville Tavern."

After his judgment and sentence had been affirmed by the Supreme Court of Pennsylvania, petitioner filed in that Court a petition for a writ of habeas corpus in which he specifically asserted that due process had been violated when the trial court received the foregoing evidence of other offenses. The Supreme Court of Pennsylvania refused to grant the writ.

II.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 1257 (3) of the Code of Judiciary and Judicial Procedure, 28 U. S. C. A. 1257 (3). The decision sought to be reviewed is a final judgment of the Supreme Court of Pennsylvania, the highest court of that state, denying petitioner's peti-

tion for writ of habeas corpus. In the Supreme Court of Pennsylvania petitioner specifically set up and claimed under the Fourteenth Amendment to the Constitution of the United States his right not to be deprived by the Commonwealth of Pennsylvania of his life and liberty without due process of law.

Petitioner specifically asserts that to have received the evidence of offenses disassociated with the offense for which he was on trial violated due process in that such evidence was sure to prejudice the jury's determination of petitioner's guilt or innocence and could not be restricted by the jury to the question of what penalty to impose upon petitioner in the event that the jury first determined that he was guilty of murder of the first degree.

III.

QUESTION PRESENTED.

Did it violate the due process clause of the Fourteenth Amendment to the Constitution of the United States to receive against petitioner in a capital case evidence of offenses disassociated from the offense for which he was being tried?

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

This case raises an important constitutional question in the administration of criminal law, to wit, the question of whether offenses disassociated from the alleged murder for which a man is being tried may be received in evidence and put before the jury under the guise of assisting the jury in fixing the penalty at death or at imprisonment for life in the event that the jury determines that the defendant is guilty of murder of the first degree. Petitioner contends that the inevitable result of receiving such evidence is (a) to deny the defendant a fair trial by prejudic-

ing the jury's determination of his guilt or innocence, and therefore (b) to violate due process.

The Supreme Court of Pennsylvania has decided this substantial federal question against petitioner and has denied his petition for a writ of habeas corpus in spite of the fact that the petition discloses facts which petitioner believes violated due process.

WHEREFORE your petitioner, David Darcy, respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings therein; and that the order of the Supreme Court of Pennsylvania affirming the judgment and sentence be reversed and that your petitioner have such other and further relief in the premises as to this Court may deem just and proper.

THOMAS D. MCBRIDE,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW.

The Supreme Court of Pennsylvania refused the petition for a writ of habeas corpus without writing an opinion.

STATEMENT OF JURISDICTION, QUESTION PRESENTED AND FACTS.

For brevity there will not be repeated here the statement of jurisdiction, the question presented and the pertinent facts, all of which appear in the petition to which this brief is annexed.

ARGUMENT.

I.

The Pennsylvania Law.

Under Pennsylvania common law, it is clear that separate and disassociated criminal offenses could not be inquired into since they would not be admissible for any legitimate substantive purpose. Of course, evidence which had such connection with the offense on trial that it served the purpose of showing scienter, motive, plan, intent, etc., was admissible, because it tended to prove one of the elements of the case, even though it also proved independent offenses. *Commonwealth v. Williams,* 307 Pa. 134.

Prior to 1925 the only penalty for first degree murder in Pennsylvania was death, and therefore the problem which

arises in petitioner's case did not exist. But the Legislature passed the Act of May 14, 1925, P. L. 759, 18 P. S. 4701 authorizing the jury in its discretion to fix the penalty at life imprisonment or death where it determined that a defendant was guilty of murder in the first degree.

The first case construing the effect of this Act on the problem of whether evidence of disassociated offenses could be received was *Commonwealth v. Parker,* 294 Pa. 144, in which the Supreme Court of Pennsylvania held that evidence of disassociated offenses could be received in evidence in order to assist the jury in fixing the penalty. The Court recognized the harm that would result where the jury would hear a defendant's past criminal record while the issue of guilt or innocence of any degree of homicide was as yet undetermined. But the Court, nevertheless, felt that the logic of the situation required that the jury be permitted to have the same type of evidence that a court would have where a court had discretion as to the sentence to be imposed.

The Supreme Court of Pennsylvania sought to limit the cases in which prejudicial evidence of other offenses would be permitted by stating in *Commonwealth v. Williams,* 307 Pa. 134, 152, that such evidence could be received only where the homicide had been committed for profit *and* the defendant was a habitual offender against society.

But the dikes were down and *Commonwealth v. Williams* was insufficient to restrain Pennsylvania courts from receiving evidence of disassociated offenses even where the defendants were not habitual criminals. Thus it is that such evidence was received in petitioner's case, notwithstanding the fact that his first alleged criminal offense was committed only twenty-two days before the homicide for which he was tried.

The Legislature sought to prohibit the receipt of evidence of disassociated offenses by passing the Act of July 3, 1947, P. L. 1239, 19 P. S. 711, which reads as follows:

"In the trial of any person charged with crime, no evidence shall be admitted which tends to show that the defendant has committed, or has been charged with, or has been convicted of any offense, other than the one wherewith he shall then be charged, or that he has been of bad character or reputation unless,—

One. He shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or,

Two. He shall have testified at such trial against a co-defendant, charged with the same offense.

Three. The proof that he has committed or has been convicted of such other offense is admissible evidence as to the guilt or the degree of the offense wherewith he is then charged."

However, in the case of *Commonwealth v. DePofi*, 362 Pa. 229, the Supreme Court of Pennsylvania adjudged the Act of 1947 unconstitutional on the grounds that its title did not give notice of its contents and its third section was vague, indefinite and uncertain.

Accordingly, it is still the law of Pennsylvania that in a murder trial evidence of other offenses alleged to have been committed by the defendant will be received even where, as in ptitioner's case, the defendant does not take the stand and the other offenses do not prove scienter, plan, motive, intent, etc. This is not in accord with any settled American custom. In Illinois, for example, a verdict finding a defendant guilty of murder and fixing his penalty at death will not be sustained where evidence had been admitted which showed the commission of other crimes and which had a tendency to influence the jury in fixing the penalty. See *People v. Mangano*, 375 Ill. 72, 77.

II.

The Pennsylvania Law as Applied in Petitioner's Case.

Petitioner did not take the stand. Therefore, the independent offenses were not proved in order to impeach his credibility. All of the evidence of other offenses was received only on the theory that it was relevant to the penalty and the trial court instructed the jury that that evidence "must not be considered by you as proof of the commission of the offense alleged to have occurred at the Feasterville Tavern." (See paragraph 4 of Petition for Writ of Habeas Corpus.)

The Supreme Court of Pennsylvania stated that the evidence of the other crimes possessed relevancy independent of the question of fixing the appropriate penalty. (Commonwealth v. Darcy, 362 Pa. 259, 263, 282, 283.) The Court cited *Commonwealth v. Strantz,* 328 Pa. 33, and stated that evidence of other crimes is receivable when the crimes are so related to each other that proof of one tends to establish the other. That may be true. However, that had not been the theory on which the evidence had been submitted to the jury in petitioner's case and it is clear at least that the evidence of the three offenses, which had been committed during the twenty-two days preceding the hold-up at the Feasterville Tavern, did not tend to establish proof of the crime committed at the Feasterville Tavern. Therefore, the problem presented by petitioner's case is unaffected by the fact that the evidence of the hold-up at the Deacon Inn may possibly have been admissible to fix the presence of petitioner and his companions at or near the scene of the Feasterville Tavern hold-up (See R. 898-900).

III.

Petitioner's Trial Was Unfair. Therefore, Due Process Was Violated.

Adamson v. California, 332 U. S. 47, 53, holds that a fair trial is guaranteed by the due process clause. Petitioner contends that the evidence of disassociated offenses made a fair trial impossible in his case.

Evidence as to a man's criminal record should be excluded not because it is irrelevant on the question of penalty, but because the evil effect of receiving it while the issue of guilt or innocence is open far outweighs the good that might be accomplished by its being considered on the question of penalty. The end and aim of a civilized trial is not merely to determine whether the accused merits life or death as a punishment, but whether he is guilty of any offense at all, and it is on this great issue that his past criminal conduct has infinite capacity to bring about injustice. The solution to the problem is to provide for a double verdict in murder cases, with evidence of disassociated offenses being received only after the jury has returned a verdict of guilty of first degree murder. Such a statute was enacted in Pennsylvania this year as part of the Crimes Act of 1949, but the Act was vetoed by the Governor on other grounds.

Petitioner submits that reasonable men everywhere must agree that jurors cannot divide their minds into compartments. No matter what the Court instructs them, jurors inevitably will act as human beings and, therefore, the defendant's criminal record will enter into their deliberations as to guilt or innocence. That is why a trial in which such evidence is received is unfair and violates due process.

The Supreme Court of Pennsylvania has acknowledged this. In *Commonwealth v. Parker*, 294 Pa. 144, the Court admitted at page 154 that proof of other offenses will inevitably be used by the jury in determining the guilt of the prisoner, but found that the objection was not insurmountable. And in *Commonwealth v. Williams*, 307 Pa.

134, the Court stated at page 151 that there could be little doubt that such evidence trenched very strongly on the fundamental rule that a distinct crime, unconnected with that on trial, cannot be given in evidence.

As petitioner has already stated, the Supreme Court in *Commonwealth v. Williams* sought to limit the number of cases in which this "fundamental rule" and fundamental fairness would be violated by saying that only a habitual criminal could have such evidence used against him. But that limitation was not enough and the invasion in the case of habitual criminals of the right to be tried fairly has become the negation of the right itself.

Dean Wigmore stated in Sec. 194, page 646, Vol. 1, of the Third Edition of his work that the natural and inevitable tendency of evidence such as that received in petitioner's case is to give excessive weight to the record of crime thus exhibited and either to allow it to bear too strongly on the crime charged in the indictment, or to make the proof of the independent offenses result in a condemnation irrespective of guilt of the crime charged. Dean Wigmore also pointed out that to put a man on trial for one offense and then offer proof of other offenses makes it impossible for him adequately to defend himself. As the Dean pointed out, evidence of disassociated offenses is objectionable not because it has no appreciable probative value, but because it has too much, and the Supreme Court of Pennsylvania has allowed the principle of informing the jury for the purpose of the penalty to displace the fundamental prohibition against prejudicing the jury's consideration of the fact of guilt or innocence. (See Wigmore Third Ed. Vol. 1, Sec. 194 at page 646, and Sec. 194b at page 661. See also *Michelson v. United States,* U. S. , 93 Law. Ed. 160, 164, which states that inquiry into other offenses is rejected not because it is irrelevant but rather because it weighs too much with the jury and denies the defendant a fair opportunity to present his defense. See *Brinegar v. United States,* U. S. , 93 Law. Ed. 1375, 1383.)

CONCLUSION.

Petitioner submits that the view of this Court as stated in *Michelson v. United States,* which is also the view of Dean Wigmore, is correct. A fundamental principle of fairness inherent in due process was violated in this case.

Pennsylvania ignored strict evidentiary procedural limitations and allowed a jury, concerned with the issue of guilt of a particular offense, to be influenced to convict for that offense by evidence that the defendant had engaged in other misconduct. This was unfair. Therefore it violated due process (*Williams v. New York,* U. S. , 93 Law Ed. 1005, 1007, 1008) and certiorari should be granted.

Respectfully submitted,

THOMAS D. MCBRIDE,
Attorney for Petitioner.